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CIVILIANS AT THE TIP OF THE SPEAR:
CIVILIAN ISSUES COMMANDERS
ENCOUNTER DURING DEPLOYMENTS

by

Lisa L. Turner, Major, USAF

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Advisor: Lieutenant Commander Patricia Lackey

Maxwell Air Force Base, Alabama

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Preface

The need for this article arose as a result of dramatic changes over the last decade in the numbers of civilian personnel a commander encounters during deployments. Commanders now regularly deploy and interact with civilians while conducting operations overseas, even during armed conflict. Commanders and their lawyers must be aware of the most common issues that will arise as they relate to the primary categories of civilians: civilian employees and contractors. This article details the status of civilians under International Law, United States Law, Department of Defense and service regulations for the major issues commanders encounter.

Once again I find myself indebted and extremely grateful to Mr. W. Darrell Phillips, Chief, International and Operations Law Division, Air Force Judge Advocate General School for his guidance, insights, and patience. I simply cannot express my appreciation to him sincerely enough. He provided the topic, significant direction in the research, and feedback on each step in the process. The article is modeled upon the lecture outline he uses when teaching this subject across the Department of Defense. I would like to also extend my gratitude to Lieutenant Commander Patricia Lackey, my research advisor at Air Command and Staff College.

Abstract

Commanders increasingly deploy with and rely upon civilian employees and contractors during deployed military operations. This article defines both categories of civilians and examines their employment under international and United States law, joint doctrine, and Department of Defense and Service regulations. The article discusses two major issues and several sub-issues involved in the utilization of civilian services in support of deployed operations. A legal perspective is brought to bear in analyzing the authorized physical and functional proximity to hostilities (termed “nexus to combat”) in which a civilian may operate without becoming an unlawful combatant. The four requirements to be a combatant are discussed and analyzed against several issues; civilian nexus to combat, command and control of civilians, arming and wear of uniforms. The article reveals that Department of Defense use of civilians in direct support of combat operations, arming civilians and mandating wear of uniforms is placing civilians dangerously close to becoming unlawful combatants. The results of becoming an unlawful combatant are discussed, including potential war crimes accountability. The status of civilian employees and contractors if captured by a belligerent force is addressed since these civilians have moved ever closer to the combat environment. Their status changes if they are unlawful combatants, a point emphasized in the article.

Chapter 1

Introduction

[C]ivilians have established themselves as an integral and vital part of the Department of Defense's total force team. With distinction, they perform critical duties in virtually every functional area of combat support and combat service support, both at home and abroad.¹

During the last decade, the United States Armed Forces have continually encountered a wide variety of types of civilians across the deployment scenario. As the Armed Forces have been called upon in ever increasing amounts to support Military Operations Other Than War, and to privatize and outsource many functions previously performed by military personnel, commanders address complex issues arising out of increased numbers of government civilian employees and contractor personnel in the deployed arena. This article examines the legal statuses of these civilians and analyzes some major issues deployed commanders address as a result of the civilian presence at the “tip of the spear.”

Department of Defense civilian employees and three categories of contractors will be defined and the importance of both groups to commanders summarized, followed by an in-depth analysis of some major issues deployed commanders confront. In particular, the authorized and appropriate physical and functional proximity to hostilities and status upon capture are examined. Finally, the article concludes with a summary of the major findings, conclusions, and recommendations that can be drawn from the body of research.

Notes

¹ Air Force Pamphlet (AFP) 10-231, *Federal Civilian Deployment Guide*, 1.1, 1 April 1999.

Chapter 2

Civilian Employees and Contractors Defined

Never has there been such a reliance on nonmilitary members to accomplish tasks directly affecting the tactical success of an engagement...the military is facing a fundamental change in the way it conducts warfare, and there is little evidence that the players have been adequately prepared for that change.¹

Commanders regularly encounter a wide variety of civilians during overseas deployments.² Civilian employees and contractors are two primary types of civilians with whom commanders interact.³ These civilians have varying statuses, rights and responsibilities depending upon the issues addressed. Analysis of issues is therefore predicated upon defining and understanding both types of civilians.

Department of Defense Civilian Employees

The DoD civilian work force shall be prepared to respond rapidly, efficiently, and effectively to meet mission requirements for all contingencies and emergencies.⁴

Civilian employees are an integral and essential part of the U.S. military total force structure. They comprise a quarter of the force strength and serve in over 17 nations.⁵ DOD civilian employees, as “partners in national defense,” regularly go into harm’s way to support military operations.⁶ Seven hundred deployed in Bosnia in support of Operation Joint Endeavor, and approximately 4,500 deployed to the Middle East in support of Operations Desert Shield and Desert Storm.⁷ As the U.S. military force downsizes and the operations it performs increase, the

interest and need to deploy civilian employees has continually grown.⁸ Undoubtedly, commanders must be prepared for civilian employees in the battlespace of the 21st Century.

Civilian employees of an armed force include “persons who accompany the armed forces without actually being members thereof” and have “received authorization, from the armed forces which they accompany.”⁹ This definition is important for triggering prisoner of war (POW) protections. The DOD civilian work force is defined as “U.S. citizens or foreign nationals hired directly or indirectly to work for the DOD, paid from appropriated or nonappropriated funds under permanent or temporary appointment.”¹⁰ Civilians hired as contract employees are specifically excluded from this definition.¹¹ The majority of deployed civilian DOD employees fill designated “emergency essential” positions.¹²

Emergency-Essential (E-E) Civilian Employees fill positions outside the United States or:

that would be transferred overseas during a crisis situation, or which requires the incumbent to deploy or to perform temporary duty assignments overseas during a crisis in support of a military operation. That position is required to ensure the success of combat operations or to support combat-essential systems subsequent to mobilization, an evacuation order, or some other type of military crisis. That position cannot be converted to a military position because it requires uninterrupted performance to provide immediate and continuing support for combat operations and/or support maintenance and repair of combat-essential systems.¹³

Generally, E-E personnel are volunteers because E-E personnel are not evacuated with other civilians during non-combatant evacuation operations.¹⁴ Non-volunteers may be used in unforeseen contingencies.¹⁵ Air Force policy is to only deploy employees who have agreed to fill these high-risk positions.¹⁶

Civilians applying for employment in E-E positions must agree in writing to participate in emergency plans exercises, deploy in the event of an emergency or crisis, and once deployed perform their required duties.¹⁷ Civilians in positions that become E-E (incumbents) are encouraged to sign the agreement, but failing to do so, may still be required to perform their

duties until the needs of the military mission allow their detail or reassignment to non-EE positions as soon as practicable.¹⁸ This issue is developed below in “Command and Control.”

Contractors

*In all countries engaged in war, experience has sooner or later pointed out that contracts with private men of substance and understanding are necessary for the subsistence covering, clothing, and moving of an Army.*¹⁹

The U.S. Armed Forces deploys with significant numbers of DOD contractor personnel across the entire range of conflict scenarios.²⁰ While armed forces have used contractors for centuries, the numbers and variety of contractor jobs have increased dramatically over the last decade.²¹ Approximately one out of every fifty deployed personnel was a contractor during Operations Desert Shield and Desert Storm.²² Those numbers rose to one out of ten in operations in the Balkans.²³ Much of the U.S. support to International Forces East Timor was provided by contractors, including medium and heavy-lift helicopters, and their air and maintenance crews which were used to airlift thousands of internally displaced persons, food, and supplies.²⁴ Contractor support is only expected to further expand in the 21st century.²⁵

Several pressures on the armed forces have resulted in the rapid and significant growth of DOD dependence on contractor support.²⁶ Force limitations placed upon commanders are a major factor pushing outsourcing and privatization. Limitations are due mainly to: ceiling caps on the size of deployable forces imposed by the President, Congress or a host nation; the post-Cold War dramatic reduction in the numbers of uniformed military members coinciding with an equally dramatic increase in the numbers and forms of employment of military forces; and recruiting and retention shortfall pressure on commanders to reduce the active duty deployment tempo.²⁷ Outsourcing is also driven by fiscal pressures to reduce costs while increasing very expensive operations. Highly technical, complex weaponry is flooding the armed forces,

bringing with it contractors hired to train military, maintain, and even operate systems. In-theater contracting for logistic support is a significant factor in reducing the logistics tail, facilitating the rapidly mobile vision of the future. These and other pressures have resulted in contracting out tasks once performed only by military members, and contractor employees performing those tasks closer to the battlespace than ever before.²⁸

The U.S. divides contractors into three categories: Systems Support, External Theater Support and Theater Support contractors.²⁹ A commander must plan for and understand how to use each type of contractor. Systems Support contractors “support specific systems throughout their system’s life cycle (including spare parts and maintenance) across the range of military operations” such as weapons, command and control, or communications systems.³⁰ Service component logistic commands or program managers award these prearranged contracts.³¹ The F-117 and Global Hawk UAV are heavily contractor maintenance dependent examples.

External Theater Support contractors may be either U.S. or third country businesses and vendors.³² Their contracts are mostly arranged prior to a deployment and are “awarded under the command and procurement authority of supporting headquarters outside of the theater.”³³ External Theater Support contracts may be “awarded or modified during the missions based on the commander’s needs” and include examples such as the Civil Reserve Air Fleet (CRAF) contracts and the Logistics Civil Augmentation Plan (LOGCAP).³⁴

Theater Support contractors are personnel employed under contracts awarded and administered by “[c]ontracting personnel with the deployed force” and the contractors work “pursuant to contracts arranged within the mission area, or prearranged through the [host nation] and/or regional businesses and vendors.”³⁵ Contractors performing a laundry contract to clean uniforms awarded to a local vendor while on deployment would fall into this category.

DOD distinctions between Systems Support, External Theater Support, and Theater Support are useful for examining issues that relate to U.S. law and DOD regulations, although these distinctions may not be useful for international legal issues. “[S]upply contractors” and “civilian members of military aircraft crews” are examples of contractors who qualify as “persons accompany the armed forces without actually being members thereof.”³⁶ Not all contractor personnel will qualify for this definition, such as local hires of External Theater Support and Theater Support contractors.

Notes

¹ Colonel Steven J. Zamparelli, “Competitive Sourcing and Privatization: Contractors on the Battlefield, What Have We Signed Up For?” *Air Force Journal of Logistics*, Fall 1999, 9, 10.

² Unless noted, a non-uniformed person is assumed to be a civilian for the purposes of this article. International law defines “civilians” in few places, often using the term civilian generally without a definition, or address civilians by exception. For example, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention IV] has the word civilian in the title, however in the body of the Convention, “protected persons” are defined and discussed rather than “civilians.” The Convention defines “protected person” by exclusion rather than inclusion. Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention I] discusses those taking no part in combat and “persons who accompany the armed forces without actually being members thereof” in art. 13(5). It uses the term “civilian population” without a definition. *See, e.g.*, art. 18. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, 1125 U.S.T.S. 3. (entered into force Dec. 7, 1978) [hereinafter Additional Protocol I] defines “civilian” by exception in art. 50. Additional Protocol I has not been ratified by the U.S. and the U.S. objects to several sections. The definition of civilian in Additional Protocol I is controversial. *See generally* W. Hays Parks, “Air War and the Law of War,” *Air Force Law Review* 32 (1990), 116. That most of our allies have ratified the Protocol, but the U.S. has not, can be a significant factor in planning for and executing coalition operations. Major Robert A. Ramey, “Armed Conflict on the Final Frontier: The Law of War in Space,” *Air Force Law Review* 48 (2000), 56. This article will only briefly touch on the controversy involving the definition of civilian as it relates to authorized nexus to combat. Specific definitions are given for the groups of civilians referenced in this article.

³ This article will not consider the issue of whether civilian employees and contractors should deploy, as such deployments necessarily do and will continue to occur.

Notes

⁴ DOD Directive (DODD) 1400.31, *DoD Civilian Work Force Contingency and Emergency Planning and Execution*, D.1., 28 April 1995.

⁵ According to DefenseLink, the Department of Defense News Service, there are 1.37 million Active duty forces as of March 1999, 1.35 million Ready and Stand-by Reserves, and as of June 1999, 703,000 Civilian Employees. *See also*, Gerry J. Gilmore, "DoD Civilians: Partners in America's Defense," *American Forces Information Service*, May 1996; Staff Sgt. Kathleen T. Rhem, "Civilians Vital to DoD Mission," *American Forces Information Service*, June 2000.

⁶ Edwin Dorn, Undersecretary of Defense for Personnel and Readiness, quoted in Gilmore.

⁷ Gilmore.

⁸ *See generally* Message, R0813247Z Headquarters United States Air Force DP/DPXC, to AIG 610, et, al., May 1997 [hereinafter DP/DPXC Message]; Roger M. Blanchard, Assistant Deputy Chief of Staff, Personnel, memorandum to general distribution, cc: SAF/IG, SAF/MIM. AFPC/CC JCS/J-1, subject: Deployment of Air Force Federal Civilians in Support of Military Operations, 24 March 1997; "Emphasis, More Civilians to Get BDU's?" *Army Logistician*, March/April 1997; Jody Brenner, "Deployment and Civilians: What Incentives Do We Need?," *Army Logistician*, July/August 1999.

⁹ Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 13(4), Aug. 12, 1949, 6 U.S.T. 3316, (entered into force Oct. 21, 1950) [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 4A(4), Aug. 12, 1949, 6 U.S.T. 3316 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention III]; Geneva Convention I, art. 13(4).

¹⁰ DODD 1400.31, C.1.

¹¹ DOD Directive (DODD) 1404.10, *Emergency-Essential (E-E) DoD U.S. Citizen Civilian Employees*, 10 April 1992, C.1; DODD 1400.31, C.1.

¹² *See generally* DODD 1404.10; *See also* "Emphasis, More Civilians to Get BDU's?" *Army Logistician*, March/April 1997. Civilian employees not designated as emergency essential can agree to perform these duties in the event of a crisis situation. Additionally, a civilian employee who is overseas when a crisis occurs can be asked to stay to perform these duties. They can decline but "shall continue to perform the functions of the position if no other qualified employee or military member is reasonably available." They must be removed from the location "as soon as practicable, given the exigencies of the military situation." DODD 1404.10, 6.5.

¹³ DODD 1404.10, E2.1.5. When an individual is hired for or otherwise enters into an E-E position and they are subject to military mobilization due to status in the Ready Reserve, Standby Reserve, or as a military retiree, the appropriate military personnel center must be promptly notified so that they may be exempted from military recall status. DODD 1400.31, D.4E.1.i.; DODD 1404.10, 6.3.1.

¹⁴ "The Ambassador, with the approval of the Under Secretary of State for Management, can order the evacuation of USG personnel and dependents other than uniformed personnel of the US Armed Forces and designated emergency-essential DOD civilians who are not under the authority of the US COM." Joint Publication (JP) 3-07.5, *Joint Tactics, Techniques, and Procedures for Noncombatant Evacuation Operations*, 30 September 1997, III-1.

¹⁵ DODD 1404.10, 4.8.

¹⁶ DP/DPXC Message, 3(A)B.

Notes

¹⁷ This agreement is discussed further under command and control of civilian employees; DODD 1404.10, 4.6, Enclosure 3, DD Form 2365.

¹⁸ DODD 1404.10, 4.7.

¹⁹ Robert Morris, Superintendent of Finance, 1781 quoted in DOD, Joint Publication (JP) 4-0, *Doctrine for Logistic Support of Joint Operations*, 6 April 2000, V-1.

²⁰ Zamparelli, 9.

²¹ Zamparelli, 9. Examples of using contractors are found in the Continental Army's use of civilians as carpenters and engineers to drive wagons, obtain food items, among other tasks so that military men could concentrate on warfighting. Major William W. Eply, *Contracting in War: Civilian Combat Support of Fielded Armies* (Washington DC, US Army Center of Military History, 1989); JP 4-0.

²² *Contractors on the Battlefield: Issues and Strategy 2000 Selected Readings* (Air Force Logistics Management Agency, December 1999), 5 [hereinafter *Contractors on the Battlefield*].

²³ *Contractors on the Battlefield*, 5.

²⁴ See Brigadier General Philip M. Mattox and Lieutenant Colonel William A. Guinn, "Contingency Contracting in East Timor," *Army Logistician*, July-Aug. 2000. Interestingly, the helicopters, subcontracted for by DynCorp, were Russian and Bulgarian.

²⁵ Lawrence J. Delaney, Acting Secretary of the Air Force, memorandum to all MAJCOM-FOA-DRU/CC, subject: Interim Policy Memorandum—Contractors in the Theater, 8 February 2001; "Assistant Secretary of the Army for Acquisition, Logistics and Technology, The Assistant Secretary Talks About Readiness," *Army Logistician*, March-April 2000.

²⁶ *Contractors on the Battlefield*, 5 (discussing all four reasons listed in this paragraph of text).

²⁷ JP 4-0, V-1. Some status of forces agreements specifically limit the numbers of contractor personnel the US Government brings into the country with them to execute a mission covered by the agreement. For example, Annex In Implementation Of The Mutual Defense Cooperation Agreement Between The Government Of The United States Of America And The Government Of The Hellenic Republic, Dated 8 Jul 90, Effective 6 Nov 90, TIAS 12321.

²⁸ Major Kim M. Nelson, "Contractors on the Battlefield: Force Multipliers or Force Dividers?," Research Report no. 130 (Maxwell AFB, Ala: Air Command and Staff College (Maxwell Air Force Base, Montgomery, 2000), 3 (discussing contracting out formerly military only tasks); Colonel Herman T. Palmer, "More Tooth, Less Tail: Contractors in Bosnia," *Army Logistician*, September-October 1999 (describing the arrival of contractor personnel at the site of the armed military seizure of a transmission tower in Bosnia during SFOR (Stabilization Force) and unloading of supplies within 30 minutes of the conclusion of the combat elements operation).

²⁹ JP 4-0, V.

³⁰ JP 4-0, V-1.

³¹ JP 4-0, V-1.

³² JP 4-0, V-2 b.

³³ JP 4-0, V-2 b.

³⁴ JP 4-0, V-2.

³⁵ JP 4-0, V-2.

³⁶ Geneva Convention III, art. 4A.

Chapter III

Commanders' Issues

It is well known that in modern armies the numbers of fighting personnel has a tendency to decrease whereas the various support units including civilians are increasing in strength.¹

Deployed commanders encounter a range of issues as they work to create a cohesive total force of military, civilian employees, and contractor personnel. Central to all other civilian issues is the question of permissible duties a civilian may perform for an armed force. Termed “nexus to combat” below, the line between permissible support and combat support roles, and impermissible military combat roles is examined. The U.S. is moving increasingly closer to this line and there are significant and far-reaching consequences of employing civilians *directly* in military operations. The permissible functional proximity to military roles is not settled in international law, nor is it settled among the services. Commanders, for a variety of reasons, should be cautious in employing civilians in roles functionally close to combatant roles. Commanders have significantly less authority over these civilians than over combatants. A commander’s ability to ensure civilians perform even those tasks they may lawfully be assigned is limited. This article examines the limitations and risks involved with providing them uniforms and weapons, increasing the possibility of them becoming unlawful combatants.

Functional proximity to combat roles often corresponds with physical proximity to enemy forces. Accordingly, this article examines the protections civilians receive if they fall into enemy hands. Our examination reveals that most, but not all civilians employed by and

contracted with DOD will be prisoners of war upon capture. We must be prepared to understand how captured civilians are entitled to be treated. Each of these issues is central to the employment of civilians as commanders seek to build a total force package.

Authorized Nexus to Combat Operations

*The citizen must be a citizen and not a soldier [...] war law has a short shrift for the non-combatant who violates its principles by taking up arms.*²

“Never has there been such a reliance on nonmilitary members to accomplish tasks directly affecting the tactical successes of an engagement.”³ Until recently, the generally accepted practice of employment of civilians was simply stated: “the closer the function came to the sound of battle, the greater the need to have soldiers perform the function because of the greater need for discipline and control.”⁴ This began to change during the Vietnam War, and has continued exponentially since that time.⁵ As a result, government employees and contractors are physically and functionally closer to the battlespace than ever before, even in roles formerly exclusively held by uniformed military members.⁶ Civilians perform actual mission tasks, such as airlift of internally displaced persons by contracted flight crews on contracted helicopters; maintain vital weapons systems such as JSTARS, Patriot, and Predator in the field and air, even during combat operations; provide support, even within minutes of the conclusion of operations by combat operations; and operate and manage intelligence and information systems.⁷ It is vital that civilians do not cross the line between lawful non-combatant support and unlawful participation in hostilities. Discerning that line focuses our attention on the international law of armed conflict.

The United States is a firm advocate of and world leader in the creation of and adherence to the Law of Armed Conflict (LOAC), rules that have evolved to govern the conduct of war.⁸

LOAC regulates the relations between belligerent governments and the persons associated with the belligerents' armed forces during hostilities.⁹ LOAC also seeks to regulate relations between belligerents and the civilian populations of each belligerent. LOAC only began to infuse a protection for civilians within the battlespace in the latter half of the Twentieth Century.¹⁰ It attempts to divide combatants from non-combatants, protecting civilians from the horrors of war, and easing the return to a peaceable end-state.¹¹

War need not be declared by a state body, such as the U.S. Congress, for LOAC to apply.¹² Almost all of LOAC applies during armed conflicts, while much of it is not legally binding during intra-state or "civil" wars or conflict between non-state actors, as we frequently encounter in Military Operations Other Than War (MOOTW).¹³ However, the U.S. has adopted the policy of complying with LOAC beyond that required by international law, instructing its armed forces to: "comply with the law of war during all armed conflicts; however such conflicts are characterized and, unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations."¹⁴

Combatants and Non-Combatants

Personnel involved in an armed conflict are classified as either combatants or non-combatants.¹⁵ This distinction is one of the most important in the international law relating to armed conflict and determines an individuals' legal status.¹⁶ In most instances, the differences will be clear.¹⁷ However, technology, outsourcing, and privatization are significantly effecting the distinctions between the two groups, complicating the question of civilian nexus to combat.¹⁸

Most uniformed members of an armed force are combatants, regardless of whether the uniformed member is with or without a combat task.¹⁹ To qualify as a lawful combatant, the individual must: (1) be under the command of a person responsible for his subordinates and

subject to an internal disciplinary system; (2) have a fixed and distinctive emblem recognizable at a distance; (3) carry arms openly; and (4) conduct operations in accordance with the laws and customs of war.²⁰ Combatants “have the right to participate directly in hostilities” and when captured are afforded prisoner of war status.²¹ They are immune under a state’s internal national law for their combatant acts as long as they comply with the law of armed conflict.²²

Non-combatants are, by negative definition, those who are not members of an armed force, as well as a very few specific members of an armed force such as medical personnel and chaplains.²³ Non-uniformed employees and contractor personnel of an armed force are non-combatant civilians and must not take part in hostilities. Although non-combatants, some, but not all, of them receive special protection as POWs if captured by a belligerent.

Physical proximity of civilian employees and contractors to conflict entails significant risks for civilians such as capture and being made the target of attack. Generally, civilians may not be made the object of military attack.²⁴ This is based upon the well-recognized LOAC principle of discrimination that requires attacks be focused only against military objectives.²⁵ “Military objectives” are “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”²⁶ Combatants, unless out of combat, e.g., wounded, are lawful military targets and may be directly targeted. As such, their location in relationship to combat is irrelevant in law, although in fact they are less likely to be targeted if removed from the immediate vicinity of combat.²⁷

Civilian presence at the site of a military target “provides no immunity for legitimate military targets in the vicinity.”²⁸ Simply put, they may become “collateral damage.” Parties to a conflict have an obligation to remove civilians from the areas of military objectives, to the

extent feasible.²⁹ Arguably, employing civilians in physical proximity to hostilities, as during Operation Desert Storm where civilian contractors served on Joint Surveillance Target Attack Radar System (JSTARS) during combat missions runs counter to this principle.

Functional proximity of civilians to roles formerly reserved for uniformed persons is a more significant issue for commanders and civilians alike, although physical proximity is one indicator of the nature of the function in question. Civilians, as a sub-category of non-combatant, generally are not authorized to take *direct part* in hostilities.³⁰ Civilians who take direct part in hostilities are “unlawful combatants” and “regarded as marauders or bandits.”³¹ In any form of armed conflict, unlawful combatants lose the protections afforded their civilian status, although not the status itself, and may be resisted by a party to the conflict by all lawful means of warfare for combating enemy armed forces.³² Thus, if a civilian employee or contractor performs a function reserved for combatants, such as taking up arms and firing at the opposition, he forfeits his protection from being made the object of direct attack.

Discerning what “direct part in hostilities” entails, therefore, becomes important. This definition is not settled under international law. “Direct part” in hostilities are those “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”³³ Civilians who take direct part in hostilities are those who take up arms, or in some other fashion attempt to capture, injure or kill enemy forces, or damage or destroy enemy property.³⁴ Direct participation also includes “functioning as a guard, lookout, or intelligence agent for an armed force.”³⁵ Commentators who define direct act broadly and argue that “[p]ersons who participate in the use of a weapon or a weapon-system in an indispensable function may not under any circumstances be designated as non-combatants by national decision” expand the definition too far.³⁶ If these views are adopted, civilian employees and

contractors are directly participating in hostilities and are subject to being made the target of attack. Direct participation in hostilities must be judged on a case-by-case basis.³⁷

Customary international law does not recognize the ability of an unlawful combatant to regain civilian status protections, once they are lost, however, a controversial 1977 treaty the U.S. has not ratified restores these protections when the civilian ceases direct participation in hostilities.³⁸ If “direct part” in hostilities is an affirmative behavior akin to taking up arms, such as sniping at military members, such a civilian should not be able to regain his non-combatant protection from direct attack. Otherwise, a civilian who is a valid military target while planning or executing an attack becomes immune from attack once he puts down his weapon and is not involved in planning another attack, although he may be captured and criminally tried. This leaves troops in an untenable position when making split second determinations as to when they can fire at a civilian sniper, or other hostile civilians.

While it is clear that civilians who take direct part in hostilities are unlawful combatants and subject to attack, it is not so clear whether civilians who perform functions classified as “*direct support*” are unlawful combatants and even if not, whether they may be directly targeted.³⁹ Certainly, civilians who provide “direct support of the enemy’s war-fighting or war-sustaining effort are at risk of incidental injury from attack.”⁴⁰ Some legal scholars argue that civilians who directly support the war effort through combatant-like activities such as logistical support for combat forces, or intelligence gathering lose their civilian protections and become lawful targets.⁴¹ Others criticize such arguments as amounting to improperly creating a quasi-combatant status that is job function dependent.⁴² Instead, these commentators assert civilians in these supporting roles do not lose their civilian status protection.⁴³ Our coalition partners that have ratified Additional Protocol I (API) may not directly target supporting civilians. API

distinguishes support of the war effort from direct participation when defining what activities make a civilian subject to direct attack.⁴⁴ “Making a contribution to the war effort” includes participating in military transportation, weapons production, or other logistical support for combat forces.⁴⁵ More than this level of activity is required for a civilian to become a lawful target.⁴⁶ The U.S. did not object to these API provisions although it did object to other provisions that it found troublesome.⁴⁷

Joint doctrine speaks generally to this issue, stating: “In all instances, contractor employees cannot lawfully perform military functions and should not be working in scenarios that involve military combat operations where they might be conceived as combatants.”⁴⁸ It asserts that contractors are neither combatants nor non-combatants, thereby creating what otherwise does not exist in international law: a third category of civilians.⁴⁹ The services interpret international law and joint doctrine in different manners. The Air Force has taken the position that civilians are non-combatants, but those performing “duties directly supporting military operations may be subject to direct, intentional attack.”⁵⁰ Civilians providing support in close proximity may also be attacked, according to a 2001 policy memorandum from the Air Force.⁵¹ This approach shifts the analysis from functional proximity to physical proximity. The Army has likewise concluded that “war-essential civilian employees working on a U.S. military base during time of [international armed conflict] would be subject to direct attack.”⁵² A prominent lawyer in the Army Judge Advocate General’s office supports targeting civilians who directly support the combatant by emphasizing the criticality of the civilian support to the mission, and The Army Judge Advocate General School adopts this view in teaching “the contract technical advisor that spends each day working with members of an armed force to make a weapon system more effective...is integrated with [the] force, [and taking an] active role

in hostilities, [and therefore] may be targeted.”⁵³ The Navy dismisses its sister service positions, describing direct support as “support by civilians to those actually participating in battle or directly supporting battle action, and military work done by civilians in the midst of an ongoing engagement” and holding that they are not subject to direct attack although they assume the risk of collateral damage because of their physical proximity to valid military targets.⁵⁴

The scenario commonly discussed goes something like this: If a military member is driving a truck filled with supplies for combat, such as ammunition or petrol, while the state of whose armed forces he is a member is involved in an armed conflict, that military member is subject to being the target of attack by the opposing state.⁵⁵ Once the military member goes back to the barracks that evening, or his home in the civilian community, he is still individually subject to being made the object of attack. What then, if a civilian is driving the very same truck? Certainly, the truck itself is a military target and may be destroyed. The civilian driver would be permissible collateral damage. The debate is about whether the civilian himself is a valid object of attack. If one decides the civilian is subject to attack as an individual when involved in this level of activity, what about when he goes home for the night to his civilian community?⁵⁶

It is very dangerous for the U.S. Armed Forces to assert that civilians who directly support the war effort may be targeted. With U.S. political sensitivity to civilian casualties, it is unlikely the U.S. would target an enemy’s civilians. At the same time, the U.S. is increasingly vulnerable to such targeting due to the numbers of civilians performing such functions. What is clear is that the U.S. Armed Forces should take a unified stance on the issue and educate civilians as to the associated risks. As the situation exists today, many of the civilian employees and contractors in the deployed location may be victims of incidental injury because of their

proximity to military targets. They may also, depending upon the definition of “direct part” and “direct support” be the direct target of attack, whether near a military target or not.

Unlawful combatants may also be criminally prosecuted by the capturing state.⁵⁷ Civilians may also be subject to prosecution by the international community for violations of the law of armed conflict commonly termed “war crimes.”⁵⁸ The U.S. has stated that unlawful combatants are war criminals.⁵⁹ The risk of being tried by an international tribunal increased significantly in 1998 with adoption of the Rome Statute of the International Criminal Court (ICC).⁶⁰ When ratified by 60 states, the ICC will have authority to prosecute both military members and civilians for war crimes, genocide, and crimes against humanity. Criminal jurisdiction will extend even to citizens of states that are not party to the treaty. Accordingly, civilian employees and contractors who become unlawful combatants may be subject to criminal prosecution by an international court and under rules of evidence and procedure fundamentally different than those of the U.S. constitutional criminal system.

A state and its military members, such as commanders, also have an affirmative duty to prevent civilian noncombatants from participating in hostilities.⁶¹ Members of the U.S. Armed Forces must comprehend, observe and enforce LOAC.⁶² Commanders are charged with training their personnel in LOAC, reporting violations, and holding violators accountable.⁶³ Commanders who authorize or permit a civilian to actively participate in hostilities could become responsible for the civilian’s acts and may become liable under international law of armed conflict, and U.S. law.⁶⁴

Command and Control of Civilians

*Sound logistics forms the foundation for the development of strategic flexibility and mobility. If such flexibility is to be exercised and exploited, military command must have adequate control of its logistics support.*⁶⁵

Two essential characteristics of combatants were mentioned above; combatants are under the command of a person responsible for his subordinates and subject to an internal disciplinary system. Military members are controlled, directed, organized, coordinated, and employed by a commander through a chain of command. Command is “authority that a commander in the Armed Forces lawfully exercises over subordinates by virtue of rank or assignment.”⁶⁶ Chain of command is “the succession of commanding officers from a superior to a subordinate through which command is exercised.”⁶⁷ Subordinates failing to obey the lawful orders of a commander above him are subject to criminal punishment in accordance with the Uniform Code of Military Justice (UCMJ).⁶⁸ These same authorities do not exist over civilian employees or contractors. Civilians are not subject to the UCMJ except when Congress has declared war.⁶⁹

Lack of command and limited control over civilian employees and contractors presents significant challenges. Civilians, contractors specifically, may fail to perform even essential services during a contingency.⁷⁰ In the vast majority of situations, civilian employees and contractors fulfil the terms of their employment or contract, even at personal risk to themselves.⁷¹ However, civilians have walked off the job during crisis situations. For example, during Operation Desert Storm, food support contractor employees refused to perform until they were provided with chemical attack protective equipment.⁷²

Commanders do have some *control* over deployed civilian employees. The Unified Combatant Commander/Component Commander exercises control over civilian employees through the deployed on-site supervisor and his supervisory chain to which the employee is attached or assigned.⁷³ The supervisor, as in a non-deployed situation, assigns tasks, reviews performance and initiates disciplinary action.⁷⁴ The deployed supervisor may impose reasonable rules, directives, policies and orders based upon mission necessity, safety, and unit cohesion.⁷⁵

Emergency-Essential civilian employees who have signed a DD Form 2365 have agreed to perform their assigned duties in the event of a crisis situation or war until relieved by the proper authorities.⁷⁶ Personnel filling E-E positions who have declined to sign the agreement may still be required to perform their duties until the needs of the military mission allow their detail or reassignment to non-EE positions.⁷⁷

Commanders can take administrative action when civilians fail to perform or are otherwise injurious to the mission. The civilians can be barred from base, or have their benefits, such as exchange, commissary, and check cashing privileges, limited or terminated.⁷⁸ Should an E-E civilian refuse to perform his duties during an emergency, he is subject to administrative penalties in accordance with labor laws, ranging from oral admonition up to removal from federal service.⁷⁹ The Air Force normally returns the employees to their home stations for suspension or removal action.⁸⁰ An extensive body of labor law must be followed in the event a civilian either commits misconduct or fails to perform his duties satisfactorily.⁸¹

Control of contractor support personnel was a primary challenge for commanders during Operation Desert Storm.⁸² This area continues to be a challenge today. A commander has much less control over contractors than he does over civilian employees. A contractor cannot be “ordered” to do anything, even the services for which he has been contracted. He is not even directly supervised by the commander.⁸³ In fact, “[t]he warfighter’s link to the contractor is through the contracting officer [KO] or the contracting officer’s representative [KOR].”⁸⁴

The rights, duties and obligations of the government and the contractor to each other are set forth in the Terms and Conditions of the contract.⁸⁵ The contractor then directs the contractor employees. The key performance terms must be carefully planned for when contracting for work that will be performed in a deployed location. The contract can incorporate theater commander

orders, directives and standard procedures that relate to personal safety, unit cohesion and mission accomplishment.⁸⁶ The contract should specify any requirement for a contractor to have weapons familiarization, immunizations, nuclear, biological, and chemical protective mask and clothing familiarization, and force protection training and measures.⁸⁷ The government should ensure the personnel sent to fulfill the contract have the training contractually required. The contract can include a provision authorizing the contracting officer to require the contractor to direct the unsatisfactory employee be removed and replaced.

If the commander determines the contract needs to be altered due to changes in the requirements for performance, the commander must work through the KO or KOR rather than by directing the contractor or contractor employee to make changes.⁸⁸ The KO or KOR will make the necessary contract modifications and the cost of the contract to the government may increase if the modification is outside the scope.⁸⁹ The commander must not obligate funds, or act to award, terminate, or administer contracts.⁹⁰ Should the contractor perform services or deliver goods without proper contractual arrangements through a KO or KOR, generally one of three courses is available: ratification, compensation under secretary residual powers as an informal commitment, or General Accounting Office claims, none of which is an optimal situation.⁹¹ Contracting specialists must be involved in damage minimization for these complex and often high-level visibility actions.

It is imperative that commanders recognize and plan for a contractor's possible failure to perform.⁹² If a contractor fails to perform, the commander, through the KO or KOR may direct that the contract be terminated for default. Depending upon the terms of the contract, the contractor employee may be removed from the theater of operations or limited from access to all

or parts of the U.S. controlled facility. Whenever a commander intends to take action against a contractor, the KO or KOR and contracting specialists should be consulted.

A commander's remedies against civilians who refuse to perform are essentially limited to, at most, firing the civilian employee and terminating the contract. The deployed commander will almost never find himself in a situation where he can take criminal action against a civilian who decides to walk off the job. The U.S. federal government may, in certain instances, prosecute certain civilians employed by or accompanying the U.S. military overseas in federal District Courts, rather than military courts.⁹³ Recent legislation permits some civilians who commit a federal offense punishable by one year or more within the jurisdiction of the U.S., to be tried criminally if the host nation has declined to prosecute them.⁹⁴ This legislation will allow commanders to refer even non-U.S. citizen civilian employees and most types of contractor and sub-contractor employees to a U.S. district court where they may be prosecuted for serious offenses such as rape, murder, and child abuse.⁹⁵ Jurisdiction over the people who are typically Theater Support contractors is not provided unless the contract employee is a third-country national brought into the country in which they do not ordinarily reside.⁹⁶ It will not provide for prosecution for failure to obey orders or dereliction of duty, prosecutions of which are used to support a commander's command authority over military members, and prosecution is dependent upon convincing a very busy U.S. Attorney to file charges in a district court.⁹⁷ There are a few other limited and seldom employed federal criminal laws that will give the federal government extraterritorial jurisdiction.⁹⁸

Contractors, unless protected by an international agreement, which is unusual, are subject to host nation laws, even when the military members are not so subject. Civilians who violate host nation law may be lost to the commander. Recently, a deployed contractor employee who

had entered the original host nation on a one-entry visa decided to take a weekend trip from one country to another. Upon returning to the host nation, he was apprehended and the military personnel were contacted. A subordinate commander went to the airport and secured the contractor's release after assuring a host nation minor agent that the contractor's services were necessary. The next day, higher ranking host nation personnel discovered the incident and expressed serious concerns. Only then was the unit judge advocate notified. The incident resulted in multiple calls to the contractor, the embassy and higher headquarters until the contractor employee could be put on the first airplane back to the U.S.

Commanders accustomed to command authority, unity of command, and flexibility may find direction of civilians difficult in the fluid deployed scenario. For example, contractors recently blatantly disregarded a commander's force protection driven directive that all personnel live in tents.⁹⁹ The contractors instead moved into a hotel, creating significant force protection, morale and contractor responsiveness concerns.¹⁰⁰ Due to the restrictive nature of contracts, contractor employees often cannot adapt to the commander's intent, an essential capability for execution of a mission, and contractors will have different agendas than commanders. Lack of control by a commander over contractor employees, except through the KO and contractor can present significant problems when rapid direction needs to be given to a contractor employee and when communications are limited due to technological or time zone problems. For example, in 1998 contractors deployed with an Army element in Kuwait were controlled, not by the on-site commander, but by contracting officers working at seven stateside locations.¹⁰¹ Personnel who have deployed are well versed in the reality of communications problems.¹⁰² Additionally, limited remedies for civilian failure to perform hamstring commanders who need civilian

services. The practical usefulness of having the option to fire a civilian is severely limited when that civilian is the only person who can perform a necessary task.

Although perhaps too late in some cases, commanders must fight hard to ensure civilians are not placed in mission essential positions. Commanders must have back-up plans in the event a civilian refuses to or cannot perform.¹⁰³ Unfortunately, the U.S. has already lost organic capabilities in some critical functions, leaving the commander with no option but to rely upon contractor support.¹⁰⁴ The trend in this area does not appear to be slowing. Additionally, commanders must have a basic grasp of the civilian employee labor system and corresponding administrative remedies, as well as an understanding of the contractual requirement and remedies associated with those involved in their mission.

Civilian Wear of Uniforms

Combatants generally have a duty to distinguish themselves from civilians while preparing for or engaging in an attack or military operations.¹⁰⁵ The second requirement to be a combatant, as identified above, is “have a fixed and distinctive emblem recognizable at a distance.”¹⁰⁶ It is international customary law that the means to satisfy this requirement is through the wear of a distinctive uniform.¹⁰⁷ The purpose of this requirement is to protect civilians from hostilities.¹⁰⁸

Today, civilian employees and contractors often wear uniforms. “Uniform” for members of an armed force is customarily accepted to include utilities, chemical warfare protective clothing and similar combat outerwear.¹⁰⁹ Both U.S. and non-U.S. citizen DOD employees in an overseas location may be required to wear a uniform under specific conditions.¹¹⁰ For a theater or component commander to require a U.S. citizen employee to wear the uniform, he must “determine there is an actual or threatened outbreak of hostilities, involving war, major civil

disturbance (or other equally grave situations), or [...] the deployment necessitates the wearing of uniforms in specifically defined geographic areas.”¹¹¹ Direct hire non-U.S. citizens may be required to wear a uniform when the commander determines it is necessary for the mission.¹¹²

Uniform wear by DOD civilian employees is governed by service regulations and identification insignia is required so that the civilian can be distinguished from the military.¹¹³ The Air Force has designated a subdued insignia consisting of a black equilateral triangle with the letters “US” in olive drab color printed on an olive drab green cloth background.¹¹⁴ However, these items are difficult to obtain and civilian employees often go without them.¹¹⁵

Theater admission requirements for contractors should include provisions on issuance of and training in defensive protective gear comparable to that issued to military in theater.¹¹⁶ The terms of the contract may specify the need for specific clothing and equipment, including mandating uniforms “when camouflage integrity or other military necessity dictates.”¹¹⁷ Air Force commanders should not provide contractors with uniforms except when there are compelling reasons, such as issuance of chemical protective gear when there is a threat of attack.¹¹⁸ Unless specified in the terms of the contract, the U.S. is not required to provide contractors with uniforms.¹¹⁹ Joint doctrine sets the standard for contractor wear of camouflage utility uniforms stating: “commanders should ensure that contractors wear a symbol that establishes their contractor status.”¹²⁰ Air Force policy requires a commander who issues uniform items to contractors ensure the contractor is distinguished from military members, such as through the use of colored patches, headgear, or armbands.¹²¹

Individual commanders should carefully consider providing contractors with uniforms for two primary reasons. First, civilians are putting themselves at risk of being intentionally or unintentionally targeted as a combatant when they wear uniforms similar to those worn by

combatants.¹²² The stated purpose of the authorization to require civilian employees to wear uniforms is to protect them by identifying them as members of the civilian component of the U.S. Forces.¹²³ However, current capability to target individuals, even from the ground, from long distances makes distinguishing civilians and military difficult at best. One would need to be on close quarters to see the distinctive patch worn by civilians. Instead, an enemy force may see the utility uniform, assume the individual is military, and target him as such.¹²⁴

Secondly, wear of uniforms brings civilians ever nearer the risks of being found an unlawful combatant, criminal prosecution, and being made the object of direct enemy attack. When commentators supporting the ability to directly attack civilians who are critical to military success (directly support the armed forces) they point to these civilians differing from military “in name and garb only.”¹²⁵ The wear of uniforms strengthens the argument that such civilians have, in name and garb, become unlawful combatants and valid military targets. Recognizing this problem and not wanting to endanger their protected status, at least two External Theater Support contractors actively discourage the wear of uniforms by their contract employees.¹²⁶ At a minimum, commanders should advise civilians on the danger of wearing uniforms and ensure they do not wear insignia, badges, or tapes identifying them as members of an armed force.

Civilian Use of Weapons

The U.S. asserts that it does not violate international law for a civilian employee or a contractor with an armed force to carry a weapon for personal defense.¹²⁷ However, as with uniforms, carrying arms openly is one of the four factors distinguishing combatants from non-combatants and the Air Force starts from a position of denying weapons to contractors.¹²⁸ Joint Publication 4-0 acknowledges that the wear of arms by contractors in a “uncertain or hostile environment can cloud their status, leaving them open to being targeted as a combatant.”¹²⁹

Civilian employees and contractors may only carry a weapon in-theater in very limited situations for personal defense and only with the express approval of the theater commander.¹³⁰ The Air Force requires theater commander consultation with host nation authorities prior to the issuance of weapons, and then “only in the most extreme circumstances.”¹³¹ This “extremely sensitive matter” must be carefully considered by the commander “in light of the circumstances of each deployment.”¹³² Joint doctrine states “[c]ivilians deployed to the operational area may be regarded by the enemy as combatants; therefore, combatant commanders may authorize the issue of weapons to DOD civilians and contractor employees on a by-exception basis for personal protection.”¹³³ Joint doctrine details several reasons for contractors not to be issued weapons and restricts the issuance from international armed conflict.¹³⁴ Air Force policy only provides for weapons to be issued for “protection from bandits or dangerous animals if no military personnel are present to provide protection.”¹³⁵ In all cases, acceptance by a civilian of a firearm is strictly voluntary and for contractors is based on the contract provisions.¹³⁶

Additional restrictions may prohibit civilian employees or contractors from having weapons. Individuals whom a supervisor or commander knows or should have reason to know have a domestic violence conviction must be denied firearms in accordance with U.S. domestic law.¹³⁷ There may also be host nation legal restrictions on the issuance of firearms to civilians. Although commanders are not responsible for contractor personnel who decide to arm themselves, commanders may not aid in the violation of host nation law. Since contractors are rarely covered under Status of Forces Agreements, they will seldom be given waivers of host nation arming restrictions. Accordingly, U.S. commanders will find themselves in the position of authorizing possession of or issuing weapons to contractors in few if any circumstances.

Commanders face the dilemma of authorizing the carrying of weapons prior to the need for their use when the situation may not warrant it, versus the urge to issue them when needed, just when the commander is consumed with directing detailed and complex operations. As with the wear of uniforms, commanders and civilians must consider that the civilians will increase the chances they will be mistaken as military members when armed. Authorization for a civilian to carry weapons should be strongly resisted except in the most extreme circumstances.

Status Upon Capture

*Every person who falls into enemy hands must have some status under international law.*¹³⁸

When physical proximity to combat increases, the risk of being captured also increases. The status of civilians who find themselves under the control of an opposition force is complex and depends upon a number of variables. The broadest and most developed protections apply to international armed conflict. Unfortunately, civilians and military alike have few protections in the types of missions the U.S. Armed Forces increasingly supports, i.e., those not involving armed conflict, such as relief missions, or those not of an international character, such as peacekeeping missions revolving around sustained, organized insurrections or rebellions.¹³⁹

Both civilian employees and contractors who have “fallen into the power of the enemy” during the course of an *international armed conflict* and who are “persons who accompany the armed forces without actually being members thereof” are generally entitled to POW status.¹⁴⁰ This status provides significant protections, including release and return to their government at the end of active hostilities unless they have criminal proceeding pending against them or are serving criminal punishment.¹⁴¹ During captivity, POWs are protected in other ways.¹⁴² Most civilian employees and many contractors will qualify for POW status.

To qualify as POWs, persons accompanying the armed forces must have “received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card.”¹⁴³ Almost all DOD civilian employees and many contractors, particularly Systems Support and External Theater Support contractors, will meet this requirement. Some contractors such as local hires, not authorized by the armed forces and not given identification cards, will not receive these protections. Identification cards record the function for which the civilian accompanies the armed force and provide the civilian with a means to prove his status.¹⁴⁴

What then are the protections afforded to civilians who do not qualify as POWs, either because the conflict is not an international armed conflict, or because they do not qualify as civilians accompanying the armed forces? Capturing parties may voluntarily afford them treatment comparable with that of a POW but international law requires much less and depends upon the nature of the operation. Basic humane treatment as set forth in the Universal Declaration of Human Rights has the most expansive applicability and provides guarantees for all people at *all times* and in all locations.¹⁴⁵ Individuals are protected from arbitrary and capricious treatment. Relevant minimum protections reflected in the Universal Declaration include the right to “life, liberty and security of person.”¹⁴⁶ Freedom from torture and cruel or inhuman treatment or punishment is guaranteed.¹⁴⁷ Individuals have a right to freedom from arbitrary arrest and detention and to fair and just trial by an impartial tribunal.¹⁴⁸

Civilians who fall into enemy hands during *armed conflict* who “tak[e] no active part in the hostilities” qualify for protections found in an article common to each of the four Geneva Conventions.¹⁴⁹ Common Article 3, as it is termed, applies during international and non-international armed conflict.¹⁵⁰ It does not protect civilians when there is no armed conflict, such

as during some forms of MOOTW. Common Article 3 is very general and primarily provides that persons must be treated humanely and may not be made the victim of murder, cruel treatment, torture, taking hostage, outrages on their personal treatment, or the criminal sentencing and execution without previous judgments pronounced by a regularly constituted court. They must also be afforded judicial guarantees recognized by civilized persons.

The 1977 Additional Protocol II to the 1949 Geneva Conventions was specifically designed to expand the humanitarian provisions afforded in Common Article 3.¹⁵¹ Additional Protocol II provides protections for civilians during most *non-international armed conflicts*.¹⁵² In other words, it applies to all non-international armed conflicts except “internal disturbances, riots and sporadic acts of violence.”¹⁵³ Additional Protocol II expands Common Article 3 protections for detained persons by adding detail to fundamental guarantees such as protection from violence, torture, and collective punishment, fundamental due process, and setting forth basic treatment for detainees, such as food, water, and practice of religion.¹⁵⁴

Additional Protocol I expands protections during *international armed conflict*, requiring humane treatment for all persons in the power of a state party to the conflict.¹⁵⁵ The physical and mental health of such persons may not “be endangered by any unjustified act or omission.”¹⁵⁶ These persons are afforded protections from “violence to life, health, physical or well-being,” “outrages to personal dignity,” punishment that is not individualized and convictions by other than “an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.”¹⁵⁷

During *international armed conflict*, Geneva Convention IV protects some captured civilians who do not qualify for protection as POWs.¹⁵⁸ The provisions of Geneva IV regarding seized persons will not protect civilian employees and contractors who are “persons

accompanying the armed forces.” The Convention provisions on internees will likely only protect Theater Support or External Theater Support Contractor Third-Country National employees who are citizens of states that do not have diplomatic ties with the detaining power. Geneva IV protected civilians have the right to leave the territory of the conflict, unless such departure is “contrary to the national interests of the State.”¹⁵⁹ They may, under limited cases, be “arrested,” “detained” or ultimately “interned” (e.g., put in a camp and guarded).¹⁶⁰ Internment may only be accomplished when “it is necessary for imperative reasons of security” or “as a penalty to be imposed on civilians.”¹⁶¹ Established procedures for interning civilians afforded treatment substantially corresponding to POWs, although they must be housed separately from POWs.¹⁶² Civilians may be interred no longer than necessary for security reasons, with the exception of those interred in relationship to a criminal proceeding or sentence.¹⁶³ At the end of hostilities, internees not awaiting criminal trial or serving a sentence shall be repatriated or returned to their last place of residence.¹⁶⁴

If a civilian qualifies as a “United Nations personnel” or “Associated personnel,” carrying out activities in support of the fulfillment of a United Nations mandated mission in an other than peace enforcement operation, he or she may be afforded additional significant protections.¹⁶⁵ These civilians detained in the performance of their duties may not be interrogated and must be promptly released and returned to the U.N. or appropriate authorities.¹⁶⁶ United Nations personnel are the military and the civilian component of a U.N. operation deployed or engaged by the U.N. Secretary-General, and who are present in an official capacity in the area where a U.N. operation is being conducted.¹⁶⁷ These are the “blue-hats,” such as those supporting United Nations Protection Force in the former Yugoslavia (UNPROFOR) and United Nations Mission in Haiti (UNMIH).¹⁶⁸ “Associated Personnel” includes persons assigned

by a government [...] with the agreement of the competent organ of the United Nations.¹⁶⁹

North Atlantic Treaty Organization (NATO) Forces tasked with assisting with UNPROFOR, and U.S. forces and associated civilians supporting the Unified Task Force in Somalia (UNITAF) but not under U.N. command and control would qualify as “Associate Personnel.”¹⁷⁰

Given the number of deployments U.S. civilians and contractors are involved in that do not qualify for international armed conflict protections upon capture, and the proximity of civilians to hostilities, the U.S. may be exposing civilians to significant threats. The U.S. must inform civilian employees and contractors of these risks and be vigilant in limiting civilian employment in areas at high-risk for capture. The U.S. must also take the lead in the international community to expand protections for civilians captured during other than international armed conflict.

Notes

¹ Serge Lazareff, *Status of Military Forces Under Current International Law* (A.W. Sijthoff, Leyden, Netherlands 1971), 77.

² James Maloney Spaight, 1911 quoted in Parks, 118.

³ Zamparelli, 9.

⁴ Epley, 1-6.

⁵ Zamparelli, 10.

⁶ Civilian personnel have been employed in frontline maintenance of combat aircraft and vital warfighting systems such as Patriot, JSTARS, and M1A1 Tank. Zamparelli, 16.

⁷ Brigadier General Mattox (regarding contracted helicopter crews and machinery during INTERFET); Palmer (regarding contractor support in Bosnia that arrived on scene within 30 minutes of combat arms operations); Zamparelli, 9, 11, 16 (regarding all listed contractor activities generally, and specifically intelligence and information support, movements toward contracting for all Air Force F-117 maintenance, and support for JSTARS and Patriot).

⁸ This is true despite the oft-quoted dismissal of international law by Clausewitz when he wrote: “War is an act of force to compel our enemy to do our will...attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it.” Carl von Clausewitz, *On War*, ed. and trans. Michael Howard and Peter Paret (Princeton, N.J.: Princeton University Press, 1989), 75. Throughout history, except for brief periods, there have been highly-ritualized practices associated with war. See generally, Michael Howard, “Constraints on Warfare,” in *The Laws of War: Constraints on*

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Warfare in the Western World, eds. Michael Howard, George J. Andreopoulos, and Mark R. Shulman (New Haven, Conn.: Yale University Press, 1994) 1.

⁹ The phrase "law of armed conflict" is used broadly and synonymously in this article with "law of war," "humanitarian law," and "international humanitarian law." Although originally the law of war/armed conflict was distinct from humanitarian law, these terms have become blurred in international law. Adams Roberts and Richard Guelff, "1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts," *Documents on the Laws of War* (Oxford: Oxford University Press, 2000), 419. Parties to a conflict are often referred to as "combatants," "belligerents," the "enemy," or "adverse party." L.C. Green, *The Contemporary Law of Armed Conflict* (Manchester, England; Manchester University Press, 1993), 84.

¹⁰ Howard, 2, 4.

¹¹ Air Force Policy Directive (AFPD) 51-4, *Compliance with the Law of Armed Conflict*, 26 April 1993, 1.

¹² Geneva Conventions I – IV, art. 2.

¹³ Military Operations Other Than War (MOOTW), also called Operations Other Than War (OOTW) entail an extremely broad category of missions performed by the armed forces, ranging from humanitarian assistance and disaster relief to sanctions enforcement and noncombatant evacuation operations to peace making and peace keeping. MOOTW fall short of full scale armed conflict and do not include "routing deployments" or traditional cold-war style stationing of troops overseas. Secretary of Defense, *Annual Defense Report to the President and the Congress*, (Washington, D.C.: Office of the Secretary of Defense, April 1997), 6 (as required by *Department of Defense Reorganization Act of 1986*, 10 U.S.C. § 113 (c) and (e), and Pub. L. No. 99-403 § 405). Although MOOTW as a term has been discouraged at various times over the last five years, it is still the common term used to describe these operations and is used by the Air Force. Air Force Doctrine Document (AFDD) 2-3, *Military Operations Other Than War*, July 3, 2000.

¹⁴ Chairman, Joint Chiefs of Staff, Instruction (CJCS Inst.) 5810.01A, *Implementation of the DOD Law of War Program*, 27 August 1999, 5a; See also Chairman, Joint Chiefs of Staff, Instruction (CJCS Inst.) 3121.01, *Standing Rules of Engagement for U.S. Forces*, 15 January 2000, A-2, para 1g; DOD Directive (DODD) 5100.77, *DOD Law of War Program*, December 9, 1998; AFPD 51-4, 1; W. Hays Parks, Memorandum to The Judge Advocate General of the Army, subject: JUST CAUSE Law of War Obligations Regarding Panamanian Civilian Wounded and Dead, 1 October 1990; See also *United States v. Noriega*, 808 F. Supp. 791, 795 (S.D. Fla. 1992) (holding that Operation JUST CAUSE was "armed conflict" for the purposes of the Geneva Conventions despite that it was not between two state actors).

¹⁵ Green, 85. Some commentators separate civilians from non-combatants, while others group civilians under non-combatants. This article applies the latter option. Knut Ipsen, "Combatants and Non-Combatants," *The Handbook of Humanitarian Law in Armed Conflicts*, Dieter Fleck ed., (Oxford, England: Oxford University Press, 1995) 65, 66.

¹⁶ Ipsen, 65.

¹⁷ See, A.P.V. Rogers, *Law on The Battlefield* (Manchester, England: Manchester University Press, 1996), 8 makes the broad, sweeping statement that "The current definition of a combatant is any member of the armed forces of a party to the conflict except medical personnel and

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chaplains. All other persons are considered to be civilians” (citing Additional Protocol I, arts. 43, para. 2, 50 para. 1).

¹⁸ Outsourcing and privatization are the commonly recognizable terms, however, the Air Force officially uses the phrase “competitive sourcing and privatization.” “Outsourcing” is the “transfer of a support function traditionally performed by an in-house organization to an outside service provider, with the government continuing to provide appropriate oversight” and “privatization” is “not only the contracting out of support functions, but also the transfer of facilities, equipment and other governmental assets to the private vendor.” Defense Science Board Task Force, *Outsourcing and Privatization*, (Washington, D.C.: Office of the Under Secretary of Defense for Acquisition and Technology, August 1996), 7A.

¹⁹ Regulations Attached to the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, art. 3, Oct. 18 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague Convention (IV) Annex]; Additional Protocol I, art. 43, para. 2; Ipsen, 66. Participants in *levee en masse* are the only civilian combatants. Hague Convention (IV) Annex, art. 2; Geneva III, art. 4. To qualify as *levee en masse* and therefore combatants, the persons taking part in hostilities must meet four requirements: 1) spontaneous armed resistance may occur only in territory which is not under the factual control of the enemy/ an occupation; 2) the taking up of arms must be spontaneous on the approach of the enemy; 3) the state and individuals being invaded must not have had time to organize a militia or volunteer corps; and 4) the participants in the *levee en masse* must conform to the law of armed conflict and applicable international law.

²⁰ Hague Convention (IV) Annex; Geneva Convention III, art. 4A(2). Additional Protocol I, art. 44, para. 3, attempts to amend customary international, Hague and Geneva law in this area in several ways, notably by indicating that armed irregulars needn’t always distinguish themselves from civilians and by removing the requirement for adherence to the law of armed conflict for certain organizations although it retained the requirement for states. See George P. Shultz, Secretary of State, letter to President Ronald Reagan, subject: forwarding the text of Protocol II along with detailed analysis and recommended understandings and reservations of Transmittal of Protocol II Additional to the Geneva Conventions of 12 August 1949, December 13, 1986; See also Parks, 97.

²¹ Additional Protocol I, art. 43, para. 2; Hague Convention (IV) Annex. Hague Convention (IV) Annex has generally been accepted to have developed into customary international law. Guy B. Roberts, “The New Rules for Waging War: The Case Against Ratification of Additional Protocol I,” *Virginia Journal of International Law*, 26 (1985), 113, n. 27; Geneva Convention III, art. 4A.

²² Ipsen, 68.

²³ Geneva Convention I, arts. 28, 30; Geneva Convention II arts. 36, 37; Geneva Convention III, art. 33; Additional Protocol I, art. 43 para. 2; Ipsen, 67; Hans-Peter Gasser, *The Handbook of Humanitarian Law in Armed Conflicts*, Dieter Fleck ed., (Oxford, England: Oxford University Press, 1995), 209, 210. Other examples of non-combatants are those *hours de combat* (out of combat) due to being shipwrecked, wounded, or sick.

²⁴ Rogers, 8; Additional Protocol I, art. 50; See also Parks, 116-145. Civilians participating in *levee en masse* are combatants and may be attacked as such.

²⁵ Additional Protocol I, art. 48; Parks, 113.

²⁶ Additional Protocol I, art. 52(2).

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²⁷ While in previous times, the "front lines" of combat were the danger zones and those in the rear were practically immune from the rigors of war, air forces and modern technology allows long-range, precision, and stealth targeting of individuals far removed from a ground element. In reality, lawful targets are not safe from the global reach of airpower except as that airpower is constrained by political considerations.

²⁸ Additional Protocol I, art. 51, para. 7; AFP 10-231, 6.3.3.

²⁹ Additional Protocol I, art. 58. The U.S. State Department has not objected to this provision. Additional Protocol I to the Geneva Conventions of 1949 has several articles that protect civilians. The U.S. signed Additional Protocol I on 12 December 1977 but has not ratified it and is therefore only legally bound to provisions that reflect customary international law. Mr. Michael Matheson, U.S. Department of State Deputy Legal Advisor, "The Sixth Annual American Red Cross--Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions," *American University Journal, International Law & Policy*, 2 (1987), 416, 428. Because the U.S. has objected to the applicability of Additional Protocol I to wars of national liberation, this article will examine the provisions the U.S. has not objected to only in terms of international armed conflict, unless otherwise noted.

³⁰ Green, 105.

³¹ Green, 105; A.R. Thomas and James C. Duncan, eds., "Annotated Supplement to The Commander's Handbook on the Law of Naval Operations," *International Law Studies*, 73 (1999), 297.

³² Additional Protocol I, art. 51, para. 3; Geneva Convention IV, art. 5, para. 3; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 13, Dec. 12, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol II]; Green, 102. See, Matheson. For non-international armed conflict, the U.S. supports Additional Protocol II, article 13 which protects civilians from being the object of attack, violence, or threats of violence, as long as they do not "take a direct part in hostilities." See Shultz, 2, Detailed Analysis, 6.

³³ Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Geneva: Martinus Nijhoff Publishers, 1987), 619.

³⁴ Thomas and Duncan, 484.

³⁵ Thomas and Duncan, 484.

³⁶ Ipsen, 67.

³⁷ Thomas and Duncan, 484.

³⁸ Additional Protocol I, art. 51; Gasser, 233; Green, 102.

³⁹ Preliminary attempts to draw a line more clearly between civilians who contribute to the "war effort" and civilians who directly participate in military operations were rejected during the drafting of Additional Protocol I because of the concern that a new category of civilian would be created, neither combatants nor civilians. Bothe, et al., *New Rules for Victims of Armed Conflicts*, The Hague 260 n.1, 294 n.8 (citing ICRC, Conference of Government Experts Report, vol. I, para. 3.1117 (1972) (1982); Lieutenant Commander Stephen R. Sarnoski, "The Status Under International Law of Civilian Persons Serving with or Accompanying the Armed Forces in the Field," *The Army Lawyer*, (July 1994), 29.

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⁴⁰ Thomas and Duncan, 484.

⁴¹ See Parks, 132.

⁴² Rogers, 8, 9.

⁴³ Rogers, 8, 9.

⁴⁴ See Sandoz, 619.

⁴⁵ Sandoz, 619; See also Rogers, 8.

⁴⁶ Sandoz, 619; See also Rogers, 8.

⁴⁷ Matheson. In fact, the U.S. Army Judge Advocate General School teaches that these provisions are probably customary international law and therefore binding. Capt Jeanne Meyer, "Protection of Civilians During Armed Conflict," *The International and Operational Law Department, The Judge Advocate General's School, United States Army, International and Operational Law Basic Course Deskbook* (Charlottesville, Va.: The Army Judge Advocate General School, 2000) 9-9.

⁴⁸ JP 4-0, V-1.

⁴⁹ JP 4-0, V- 7. Hague Convention (IV) Annex, for example, states "the armed forces of the belligerent parties may consist of combatants and non-combatants. Hague Convention (IV) Annex, art. 3.

⁵⁰ AFP 10-231, 6.3.3.

⁵¹ Delaney, Attachment, 2.

⁵² Parks, 134.

⁵³ Parks, 132 (stating "the work of some civilians has become so critical to military success that those individuals are civilians in name and garb only." Major Jeffrey Corn, "Protecting Human Rights During Military Operations," *The International and Operational Law Department, The Judge Advocate General's School, United States Army, International and Operational Law Basic Course Deskbook* (Charlottesville, Va.: The Army Judge Advocate General School, 2000), 15-3 (providing the example of civilians subject to attack).

⁵⁴ Thomas and Duncan, 484 n. 14 and accompanying text.

⁵⁵ Parks, 135.

⁵⁶ See Parks 134, Rogers, 8.

⁵⁷ Green, 105.

⁵⁸ See Additional Protocol I, art. 85, para. 3(a); See Green, 101, 276; Ipsen, 68.

⁵⁹ The U.S. stated in international war crimes tribunals after World War II that the U.S. position is that unlawful combatants are war criminals. Law Reports of Trial of War Crimes, Vol. 15, at 110, Nuremberg Trials.

⁶⁰ President Clinton signed the treaty on 31 December 2000. As of 31 December 2000, 139 states have signed the treaty, including every member of the EU and all other major allies, i.e., Canada and Australia. As of 31 December 2000, 27 states have ratified the treaty. Status of ratification of the ICC Rome Treaty is available at <http://www.un.org/law/icc/statute/status.htm>

⁶¹ See Parks, 118.

⁶² DODD 5100.77; AFPD 51-4, 1.

⁶³ DODD 5100.77; AFPD 51-4, 1.

⁶⁴ See Green, 102; DODD 5100.77.

⁶⁵ Rear Admiral Henry E. Eccles, quoted in Nelson, 7.

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⁶⁶ Joint Publication (JP) 1-02, *DOD Dictionary of Military and Associated Terms*, 23 March 1994, as amended Through 1 September 2000, 90. This has been so since the time of the great Roman Army. “The centurion replied... ‘For I myself am a man under authority, with soldiers under me. I tell this one, ‘Go,’ and he goes; and that one, ‘Come,’ and he comes...’ Matthew 8:8-9, *New International Version Bible* (Wheaton, Illinois, Tyndale House Publishers, Inc., 1991).

⁶⁷ JP 1-02, 73.

⁶⁸ *Uniform Code of Military Justice, US Code*, vol. 10, secs 801, *et. seq.* (5 May 1950).

⁶⁹ *Reid v. Covert*, 354 U.S. 1222 (1957); *Uniform Code of Military Justice*, sec. 802, art 2a(10); *See also* Rules for Court-Martial 202, Persons Subject to the Jurisdiction of Courts-Martial, Discussion, Manual for Courts-Martial, II-13, 2000 Edition; DA Pam 715-16, Contractor Deployment Guide; *U.S. v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970) (holding that there was no court-martial jurisdiction over an Army contractor employee serving in Vietnam). Of note, World War II was the last declared war the U.S. was involved in. For a variety of reasons, it is unlikely the U.S. Congress will declare war again, although we will certainly continue to be involved in large scale armed conflict.

⁷⁰ JP 4-0, V-3; DOD Instruction (DODI) 3020.37, *Continuation of Essential DoD Contractor Services During Crisis*, 6 Nov 1990 (ASD (FM&P) through Ch 1 (26 Jan. 1996)). They may fail to perform due to their desire to remove themselves from the hostilities, or because they are prevented from doing so due to a situation beyond their control.

⁷¹ For example, contractors performed during Operations Desert Storm in Saudi Arabia; Uphold Democracy in Haiti and Restore Hope in Somalia. James C. Hyde, “Defense Contractors Serve on the Front Lines of Operations Desert Storm,” *Armed Forces Journal International*, March 1999, 32; *Law and Military Operations in Haiti, 1994 – 1995: Lessons Learned for Judge Advocates*, (Charlottesville, Va.; Center for Legal and Military Operations, 11 December 1995), 142.

⁷² Major Maria J. Dowling & Major Vincent J. Feck, *A Joint Logistics and Engineering Contract*, Issues and Strategy 2000 Selected Readings: Contractors on the Battlefield, Air Force Logistics Management Agency (December 1999) at 63.

⁷³ DODD 1400.31, D. 4; AFP 10-231, 1.5.

⁷⁴ AFP 10-231, 1.5.

⁷⁵ AFP 10-231, 1.5.

⁷⁶ DODD 1404.10, 6.2.

⁷⁷ Reassignment or detailing should occur as reasonably practicable and consistent with the needs of the military, and any tour extensions should be disapproved. DODD 1404.10, 4.7.

⁷⁸ E.g., if the civilian gets into fights at the club, he can be barred from there while still permitted to perform his duties. The right of a commander “to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command” was recognized in *United States v. Spock*, 424 U.S. 824 (1976). *See also* *Cafeteria & Restaurant Workers Union V. McElroy*, 367 U.S. 886 (1961).

⁷⁹ 5 U.S.C. §§ 7504, 7514, 7543 (13 Oct 1978); *Adverse Actions, US Code*, vol. 5, secs. 7504, 7514, 7543; *Adverse Actions*, vol. 5 *Code of Federal Regulations* (CFR) Office of Personnel Management’s (OPM) secs. 752, Subparts A - D (January 1, 1997 Ed.); DODD 1404.10, encl. 3, DD Form 2365.

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⁸⁰ DP/DPXC Message, 7(A).

⁸¹ See generally *Adverse Actions*, *US Code*, vol. 5, secs. 7504, 7514, 7543; *Adverse Actions*, vol. 5 *Code of Federal Regulations* (CFR) Office of Personnel Management's (OPM) secs 752, Subparts A - D (January 1, 1997 Ed.); AFPD 36-7, *Employee and Labor-Management Relations*; Air Force Instruction (AFI) 36-704, *Discipline and Adverse Actions*, July 22, 1994.

⁸² Kathleen A. Bannister, "One-Stop Shopping at CECOM," *Army Logistics*, January-February 1999.

⁸³ Major Mike O. Lacey, CDR Brian J. Bill, eds., *Operational Law Handbook* (Charlottesville, Virginia: The Army Judge Advocate General School, 2001), 150.

⁸⁴ JP 4-0, V-1; See generally *General Servs. Admin. Et Al.*, *Federal Acquisition Regulation* sec. 1.602 (1 Apr. 1984) (as amended) [hereinafter FAR] (regarding contracting and contracting officers) See generally Lieutenant Colonel Douglas P. DeMoss, "Procurement During the Civil War and Its Legacy for the Modern Commander," *The Army Lawyer*, March 1997, 9 (an interesting historical examination of why contracting rules, such as the use of a contracting officer developed and how they are useful today).

⁸⁵ JP 4-0, V-1.

⁸⁶ Lacey, 150.

⁸⁷ Lacey, 150; JP 4-0, V-3.

⁸⁸ Lacey, 150.

⁸⁹ See generally FAR, Part 43 (Contract Modifications).

⁹⁰ See FAR, 1.602-1.

⁹¹ See FAR, 1.602-3 (ratification actions); 50.302(d) (service secretarial compensation); 50.302-3 (informal commitment actions); *Limitations, Exceptions, and Penalties*, *U.S. Code*, vol. 31, sec. 1341, et. seq.; Comptroller General of the United States, *Government Accounting Office Claims*, Decision 33, B-115761, (Washington D.C.: General Accounting Office, 1953), 20.

⁹² JP 4-0, V-3 (regarding contractors); Delaney, Attachment, 1.

⁹³ *Military Extraterritorial Jurisdiction Act of 2000*, *U.S. Code*, vol. 18, secs. 3261, eg. seq. (22 November 2000). This bill also allows prosecution of a limited group of former military personnel. See Captain Glenn R. Schmitt, "The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad--Problem Solved?" *The Army Lawyer*, December 2000, 1.

⁹⁴ *Military Extraterritorial Jurisdiction Act of 2000*, sec. 3261. If a nation having jurisdiction of the offense is prosecuting or has prosecuted the civilian, the U.S. must obtain the approval of the Attorney General or Deputy Attorney General prior to trying one of these civilians. The Office of the Secretary of Defense, General Counsel is currently working on implementing regulations. Message from The Judge Advocate General, United States Air Force, to The United States Department of the Judge Advocate General, TJAG Online News Service, 6 December 2000.

⁹⁵ For example, in 1996, a civilian from Misawa Air Base raped a 12-year-old American girl. Since Japan declined to prosecute him, no criminal action could be taken against him and he was simply sent back to the U.S. Technical Sergeant Chris Haug, "AF General Counsel Supports U.S. Jurisdiction Overseas," *U.S. Online News*, 13 April 2000 available at http://www.af.mil/newspaper/v2_n14_s7.htm. In another incident, an Air Force civilian employee molested 24 children between the ages of nine and 14. The host nation refused to

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prosecute the employee and he was barred from base. Chamblis, Saxby and McCollum, Bill *Joint Statement on the Introduction of the Military Extraterritorial Jurisdiction Act*, December 12, 1999 available at <http://thomas.loc.gov/cgi-bin/bdquery>.

⁹⁶ *Military Extraterritorial Jurisdiction Act of 2000*, sec. 3267(1).

⁹⁷ In addition to the high load already overburdening the U.S. federal criminal system, there are other factors creating pressure not to prosecute under this statute except in the most extreme circumstances. The practical problem of bringing in witnesses from thousands of miles away is compounded by the lack of subpoena power by U.S. district courts over foreign witnesses, although foreign civilian witnesses often voluntarily testify in military courts-martial. Major David Crawford, "Military Extraterritorial Jurisdiction Act," (LL.M. Thesis, The Army Judge Advocate General School, 2000); Susan S. Gibson, "Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem," *Military Law Review* 148 (1995): 114.

⁹⁸ *Frauds and Swindles*, U.S. Code, vol. 18, sec. 1341 (25 June 1948) (mail fraud); *Bribery, Graft and Conflict*, U.S. Code, vol. 18, sec. 201 (23 Oct. 1962) (bribery and graft); *Grave Breaches of The Geneva Conventions* U.S. Code, vol. 18, sec. 2441 (21 Aug. 1966); *Espionage and Censorship*, U.S. Code, vol. 18, sec. 793 (25 Jun. 1948) (espionage); *Homicide*, U.S. Code, vol. 18, sec. 1116 (24 Oct. 1972) (murder or manslaughter of foreign officials, official guests, or internationally protected persons); *Kidnapping*, U.S. Code, vol. 18, sec. 1201 (25 Jul. 1948); *Claims and Services in Matters Affecting Government*, U.S. Code, vol. 18, secs. 286, 287 (25 Jun 1948) (conspiracy to defraud the government) (false, fictitious, of fraudulent claim against the U.S.), among others.

⁹⁹ Major Melvin S. Hogan, "Contractors in the Joint Theater: The Need for a Joint Doctrine" Research Report (Newport, RI: Naval War College, 1999), 15.

¹⁰⁰ Hogan, 15.

¹⁰¹ Hogan, 15.

¹⁰² For example an Army transportation battalion supporting Operation Joint Endeavor in the Balkans had mission impacting telephone communication problems as they moved Task Force Eagle from Hungary into Croatia. Major James P. Herson, Jr., "Road Warriors in the Balkans," *Army Logistician*, March-April 1997.

¹⁰³ DODI 3020.37; Delaney, Attachment, 1.

¹⁰⁴ Zamparelli, 12.

¹⁰⁵ Additional Protocol I, art. 44, para. 3: *See also*, Ipsen, 75.

¹⁰⁶ Arguably, Additional Protocol I weakens the required use of uniforms through its broad definition of "armed forces" in article 43 which includes guerrillas and removes a requirement for such irregulars to distinguish themselves from civilians through the wear of fixed insignia. Roberts, 128. However, such an irregular must carry his weapon openly both when visible to an adversary while "engaged in a military deployment preceding the launching of an attack in which he is to participate" and while engaged in hostilities. Additional Protocol I, art. 44, para. 3.

¹⁰⁷ Ipsen, 76. *See generally*, Additional Protocol I, art. 44, para. 7 which provides: "This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict."

¹⁰⁸ Ipsen, 75.

¹⁰⁹ Roberts, 128 n. 108.

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¹¹⁰ DODD 1404.10, 6.9.8; AF Instruction (AFI) 36-801, *Uniforms for Civilian Employees*, 29 April 1994, 1.1; AFP 10-231, A4.15.

¹¹¹ AFI 36-801, 1.1.2.

¹¹² AFI 36-801, 1.1.2.

¹¹³ AFI 36-801, 6.7.

¹¹⁴ AFI 36-801, 6.7.

¹¹⁵ Mr. W. Darrell Phillips, Chief, International Law and Operations Division, Air Force Judge Advocate General School, Maxwell AFB, Ala., interview by author, 10 May 2000.

¹¹⁶ DODI 3020.37, 8b. The Unified Combatant Commander is responsible for establishing theater admission requirements for civilian employees and contractors which at minimum must include issuance of a identification card; POW training; Law of War training; issuance of and training in uniforms. DOD Directive (DODD) 1400.31, *DoD Civilian Work Force Contingency and Emergency Planning and Execution*, April 28, 1995, D.5; DOD Instruction (DODI) 1400.32, *DoD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures*, April 24, 1995, E.3.b-e.; DODI 3020.37. (delineates guidelines for theater admission procedures for contractors); AFP 10-231, 2.4. Air Force planning is directed by AF Instruction (AFI) 36-507, *Mobilization of the Civilian Work Force*, 21 July 1994; *See also* Joint Publication (JP) 3-11, *Joint Doctrine for Nuclear, Biological, and Chemical (NBC) Defense*, 10 July 1995, 8.a. It is the deploying component's responsibility to ensure the theater admission requirements are complied with. DODD 1400.31, D.5. For civilians already in theater at the time of requirement establishment or update, the responsibility for compliance is shifted to the unit in-theater where the employee is assigned or attached. DODD 1400.31, D.5.

¹¹⁷ JP 4-0, V-7; Lacey, 151.

¹¹⁸ Delaney, Attachment, 3.

¹¹⁹ Lacey, 151.

¹²⁰ JP 4-0, V-7.

¹²¹ Delaney, Attachment, 3.

¹²² It is interesting to note that when a proposal was made during a working group meeting to draft what became Article 79, Additional Protocol I, to obligate journalists protected under Article 79 to wear a clearly visible and distinctive emblem shaped like a bright orange armlet with two black triangles, the proposal was rejected primarily because such identification might increase the danger to the journalist and civilians near him. Pilloud et al., 919.

¹²³ AFI 36-801, 6.2.

¹²⁴ Pilloud et al., 919.

¹²⁵ Parks, 132.

¹²⁶ Dowling & Feck, 70 (Brown & Root and DynCorp resist the wear of uniforms by their employees).

¹²⁷ DODD 1404.10, 6.9.8; AFP 10-231, 6.3.4; JP 4-0, V-7.

¹²⁸ Delaney, Attachment, 3.

¹²⁹ JP 4-0, V-7.

¹³⁰ *Carrying of Firearms, U.S. Code*, vol. 10, sec. 1585 (31 Jul 1958); DODD 1404.10, 6.9.8; Lacey, 152; JP 4-0, V-7; Delaney, Attachment, 3.

¹³¹ Delaney, Attachment, 3.

¹³² AFP 10-231, 2.3.3.

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¹³³ JP 1-0, O-2.

¹³⁴ JP 4-0, V-7.

¹³⁵ Delaney, Attachment, 3.

¹³⁶ AFP 10-231, 2.3; DP/DPXC Message, 4(A); JP 4-0, V-7.

¹³⁷ *Lautenberg Amendment, U.S. Code*, vol. 18, secs. 922(d)(9), 922(g), 922(s), 925(a)(1) (30 September 1996) (amending the *Federal Gun Control Act of 1968, U.S. Code*, vol. 18, sec. 922 (1968); AFP 10-231, 2.3.1.

¹³⁸ Sarnoski, 29.

¹³⁹ Unorganized or short-lived insurrection and criminal acts of banditry do not qualify as “armed conflict.” Major John Embry Parkerson, Jr., “United States Compliance With Humanitarian Law Respecting Civilians During Operation Just Cause,” *Military Law Review*, 133, (1991) 347, n. 30.

¹⁴⁰ Geneva Convention III, art. 4A(4). Although often referred to as “capture” the more correct phraseology is “fallen into the power of the enemy,” a broader concept than capture, including for example, members of the armed forces who are under enemy control after surrender before repatriation. Jean S. Pictet, ed., *Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War*, (Geneva: International Committee of the Red Cross, 1960), 50.

¹⁴¹ Geneva Convention III, art.s 118, 119; Horst Fischer, “Protection of Prisoners of War,” *The Handbook of Humanitarian Law in Armed Conflicts*, Dieter Fleck ed., (Oxford, England: Oxford University Press, 1995), 365.

¹⁴² *See generally*, Geneva Convention III, art. 4A(4).

¹⁴³ Geneva Convention III, art. 4A(4).

¹⁴⁴ Ipsen, 95; Pilloud, et al., 923. The identification card does not itself create the legal status entitling a person to POW protections.

¹⁴⁵ Universal Declaration of Human Rights. G.A. Res. 217 A(III), December 10, 1948, U.N. Doc. A/810 at 71 (1948) [hereinafter Universal Declaration].

¹⁴⁶ Universal Declaration, art. 3.

¹⁴⁷ Universal Declaration, art. 5.

¹⁴⁸ Universal Declaration, arts. 7-11.

¹⁴⁹ Geneva Conventions I – IV, art. 3 [hereinafter Common Article 3].

¹⁵⁰ Common Article 3 states it applies to “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” High Contracting Parties are the state signatories to the U.N. Charter. The protections of Common Article 3 have also been recognized as customary international law applicable to any armed conflict. *Prosecutor v. Dusko Tadic A/K/A/ “Dule,” International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, Case No. IT-94-1-AR72 (2 October 1995).

¹⁵¹ Shultz, 1; “Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims,” *American Journal of International Law*, 81, (1987), 910 (reprinting Letter of Transmittal of Protocol II Additional to the Geneva Conventions of 12 August 1949 from the President of the United States, to the United States Senate).

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¹⁵² Additional Protocol II; Additional Protocol II purports to exclude from its coverage: (1) international armed conflict between states as recognized in the four Geneva Conventions; (2) armed conflicts termed wars of “national liberation” in article 1(4) of the Protocol; (3) non-international armed conflict not covered by any of the Geneva Conventions, except article 3, such as “guerrilla conflicts in which insurgent groups do not control substantial territory on a permanent basis or conduct sustained and concerted regular military operations; and (4) internal violence not rising to the level of “armed conflict” such as riots and sporadic terrorist acts. Although the U.S. has not ratified it, much of Protocol II reflects customary international law and the U.S. asserts that the Protocol should apply to all armed conflicts covered by Common Article 3. Shultz, 1, Detailed Analysis, 2. (objecting to the limited types of internal conflicts Additional Protocol II covers). The U.S. supports the exclusion of the first and fourth types of conflicts from the protections of Additional Protocol II, but disagrees with the exclusion of “liberation wars” as set forth in the second exception, and guerilla wars and insurgent conflicts where the insurgents do not hold territory and conduct regular, sustained military operations as defined in the third exception. Shultz, 2 Detailed Analysis, 2.

¹⁵³ Shultz, 2.

¹⁵⁴ Additional Protocol II, arts. 2, 4, 5; Shultz, 1.

¹⁵⁵ Additional Protocol I, art. 75. The U.S. has not objected to this provision as it represents customary international law. Matheson.

¹⁵⁶ Additional Protocol I, art. 11.

¹⁵⁷ Additional Protocol I, art. 75.

¹⁵⁸ Geneva Convention IV, arts. 2, 4. Other provisions of Geneva Convention IV apply to a broader range of civilians.

¹⁵⁹ Geneva Convention IV, art. 35.

¹⁶⁰ Geneva Convention IV, arts. 41-3, 68, 78p para. 1; Gasser, 288. Although these provisions are only binding in international armed conflict, the US has adopted the policy of applying it in all armed conflict.

¹⁶¹ Geneva Convention IV, arts. 41-3, 68, 78p para. 1; Gasser, 288.

¹⁶² Geneva Convention IV, arts. 79 – 141.

¹⁶³ Geneva Convention IV, art. 134.

¹⁶⁴ Geneva Convention IV, arts. 133, 134; Gasser, 291.

¹⁶⁵ Convention on the Safety of United Nations and Associated Personnel, art. 2, U.N.D. A/49/742, December 2, 1994 [hereinafter Safety of U.N. and Associated Personnel Convention]. The Convention entered into force on 15 January 1999 for those approximately 27 states that have ratified it or acceded to it. The U.S. has signed, but not ratified the convention, however some of our allies such as the United Kingdom and Germany have. Article 20 of the Convention details that this Convention supplements, rather than overrides international humanitarian law and universally recognized standards of human rights, such as Common Article 3 protections. Art. 20. The Convention applies when the General Assembly or Security Council have declared that “there exists an exceptional risk to the safety of the personnel participating in the operation” and during operations authorized by the General Assembly or Security Council under Chapter VI and conducted under U.N. operational control. Safety of U.N. and Associated Personnel Convention, art. 1, 2. Operation Desert Storm is an example of a peace enforcement action

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authorized under Chapter VII of the U.N. Charter. Operation Provide Relief in Somalia was authorized under Chapter VI of the Charter.

¹⁶⁶ Safety of U.N. and Associated Personnel Convention, art. 8.

¹⁶⁷ Safety of U.N. and Associated Personnel Convention.

¹⁶⁸ Evan T. Bloom, "Current Development: Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel," *The American Journal of International Law*, 89 (July 1995), 622.

¹⁶⁹ Safety of U.N. and Associated Personnel Convention, art. 1(a)(ii) 1(b).

¹⁷⁰ Bloom, 623.

Chapter 4

Conclusions

Deployed commanders continually deal with civilians across the conflict spectrum. Increasingly, a commander's very ability to accomplish a mission is integrally involved with civilian support. However, it is only recently that those outside the civilian employee or logistics systems are recognizing the numbers and seriousness of issues raised by this change in the way the U.S. conducts its operations. Ten years after the employment of thousands of civilians in the Gulf War, joint doctrine and Air Force policy on logistics has just now begun to address the contractors' role in deployed operations. Even today, the services are struggling with defining and taking a unified stance on several civilian-related issues, such as their authorized nexus to combat operations, uniforms, and weapons. Many other issues have yet to be identified.

How close are we to civilian employees and contractors actually, or being perceived as, crossing the line into combatant activities? If we haven't already crossed the line, we are very close to doing so. This area needs more extensive research and policy development. Certainly civilians who work close to hostilities, in a job that is functionally similar to combat, who wear uniforms and carry arms openly will likely appear to opposition forces to be unlawful combatants. Unlawful combatants are at risk of several levels of harm, from physical targeting to war crimes prosecution and more.

The U.S. armed forces must take an aggressive and unified stance in addressing the vast array of challenging issues. Commanders and their judge advocates must work to clarify these issues and draw lines over which they are not willing to cross. Civilians should not be made direct participants in hostilities. They should be protected from attack when they directly support the effort of the military, and they must be protected from physical and functional proximity to combat operations. They should not be uniformed or armed except in the most extreme circumstances, and then not in armed conflict situations. Commanders must plan for civilian failure to perform. Commanders must refuse to give up organic capabilities in any roles that will be required for effective mission accomplishment. Commanders and civilians must understand the complexities of status upon capture and ensure they do not act in ways that jeopardize the maximum protections available. Commanders, at minimum, have a moral obligation to inform civilian employees and contractors of the risks involved in physical and functional proximity to combat.

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